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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

Supreme Court, U.
FILED
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MICHAEL RODAK, JR.,

No. 72-1191

IRVING B. KAHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF IRVING B. KAHN, PETITIONER

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I. Replying to Government's Opposition to Petitioner's Perjury Point

1. The Memorandum in Opposition misinterprets the record and also begs the question when it asserts that no recantation defense was available to Irving Kahn because he recanted after it became manifest to him that the falsity of his prior statement "has or will be exposed." The record is misinterpreted because the government's summary of facts omits to state that the correction of Mr. Kahn's original testimony began in a meeting between Mr. Kahn's attorney and the prosecutor on December 18, 1970, *before* the confessions of Tompkins and Deardorff to the grand

jury on December 29,* and the process of correction continued until January 27 when the prosecutor permitted Mr. Kahn to make a corrective statement to the grand jury. (See, Kahn's Reply Brief below, pp. 31-32, including footnote p. 32.) The question is begged because the trial of the case under Section 1621—the old perjury statute, which contains no recantation defense—precluded development of evidence on the issue of recantation, including the question of whether Kahn recanted before or after it was manifest that the falsity was discovered.

As we pointed out in our Petition this issue raises the factual questions as to *what* was known to Mr. Kahn at various times, as well as the question of *when* the recantation was actually made. The Memorandum in Opposition assumes, without basis, that Mr. Kahn somehow knew immediately of the secret testimony given by Deardorff before the grand jury. In effect the Memorandum in Opposition invites this Court to make the same mistake as the Court of Appeals, namely to decide factual issues which could not be presented at the trial because prosecution of the case under the wrong statute excluded those issues. Further, the Memorandum in Opposition ignores our argument that these factual issues must be determined by the jury rather than the court.

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* See Colloquy at the trial in which the following statement made by Mr. Kahn's counsel was not denied by the prosecutor: "Mr. Fleming: A statement was submitted to Mr. Morvillo, requesting permission to make the statement. This ran over a long period, *it started December 18,* but the result was this statement which Mr. Kahn wanted to read in the grand jury. It was presented to Mr. Morvillo." (Appellants' Appendix in Court of Appeals 644a) (emphasis added).

2. The Memorandum in Opposition as well as the Court of Appeals' opinion asserts that Kahn obtained "the benefit of consideration by the trial court of his alleged recantation defense." This argument overlooks the fact that erroneous trial of the case under Section 1621 prevented development of the relevant facts, and also overlooks our basic argument that the jury and not the trial judge must make such a determination of fact.

Furthermore, we feel constrained to point out that in fact the trial judge at no time purported to determine the merits of a recantation defense. During the trial the court ruled that the prosecution had the right to elect to proceed under Section 1621, and that the recantation defense provided by Section 1623 had no application to the case. At the time of post-trial motions the trial court reiterated this ruling, saying:

> "With respect to this count, Kahn's first claim is that the government proceeded under the wrong statute, indicting Kahn under 18 U.S.C. Section 1621, instead of under 18 U.S.C. Section 1623, thereby depriving him of a defense to this count. This argument was ruled on by the court from the bench, adversely to Kahn, during trial, when the objection was made for the first time." (Appellants' Appendix in Court of Appeals 1042a).

The language apparently relied upon by the Memorandum in Opposition to support its claim that the trial judge considered the merits of the recantation defense appears at 1043a of Appellants' Appendix in the Court of Appeals. Read carefully in context it is clear that this language was merely the trial court's response to an evidentiary argument that in view of the policy considera-

tions underlying Section 1623 a recantation should not be admissible as proof of falsity of the original statement even in a Section 1621 prosecution. In this connection the court in a post-trial motion merely said that on the truncated trial record it was "not entirely clear" that Kahn would have prevailed on his recantation defense were Section 1623 applicable.

3. The Memorandum in Opposition is likewise in error in stating that the defense failed in its duty to request "jury consideration of or a jury instruction on this matter. . . ." (Memorandum in Opposition p. 5). Although the trial court's ruling that Section 1621 was the appropriate statute relieved the defense of such a duty, in order to protect the record, the defense nevertheless made a request to charge on the defense of recantation adapted from the language of Section 1623. (Appellants' Appendix in Court of Appeals 1033a). This request was denied by the court on the ground that Section 1621 not Section 1623 was the appropriate statute. (Appellants' Appendix in Court of Appeals 975a-976a).

4. The Memorandum in Opposition is in error in attempting to deny that there is a conflict between the Circuits as to whether the prosecution may elect to proceed under either Section 1621 or Section 1623. The first case to be considered by a Circuit Court of Appeals was *United States* v. *Clizer*, 464 F. 2d 121 (9th Cir.), *cert. denied*, 409 U.S. 1086 (1972). In that case the prosecution proceeded under Section 1621. Upon appeal it was argued that the two witness rule imposed by Section 1621, but dropped in Section 1623, was not satisfied by the evidence. The Court of Appeals held that the enactment of Section 1623 abolished the two witness rule in cases "to which 18 U.S.C. Section

1623 applies," namely, perjury before federal courts or grand juries. The decision in *Clizer* necessarily negates the notion that the prosecution has a power to elect between the two statutes, because despite the "election" of the government to prosecute under Section 1621, the Court of Appeals judged the case under the provision of Section 1623, and expressly stated that Section 1623 "changed the rule." The court in *Clizer* held that Section 1623 was the sole statute now applicable to perjury before federal courts and grand juries and that identification of the charge in the indictment as a violation of Section 1621 was immaterial so long as a violation of Section 1623 was proved.

In *United States* v. *Ruggiero*, 472 F. 2d 599 (2d Cir. 1973), Petition for Certiorari filed March 24, 1973, No. 72-1300, the Court of Appeals for the Second Circuit ruled that Section 1621 and Section 1623 overlapped and that "the Government is entitled to choose among them . . ." so long as there is no discrimination between classes of defendants. In so ruling the Second Circuit disagreed with the conclusion of the Ninth Circuit in *Clizer* that only Section 1623 was now applicable to perjury before federal courts and grand juries.

In the instant case, which was decided after *Clizer* and before *Ruggiero*, a different panel in the Second Circuit expressed grave doubts as to the government's right to elect between the two statutes, but did not reach the issue. Thus, in the first three cases to reach the Courts of Appeals the results were one heads, one tails, and one coin balanced on edge.

As we point out in our Petition, the Court of Appeals strained too far in an attempt to avoid reaching this issue, and thus committed the error of attempting to de-

termine upon appeal a factual issue as to which the evidence could not be developed at the trial, which factual issue in any event must be constitutionally determined by a jury and not by the court.

II. Replying to Government's Opposition to Petitioner's Travel Act Point

In our Petition we contended that a proper interpretation of the Travel Act precluded the conviction of a *victim* of extortion, especially when considered in connection with its sister statute, 18 U.S.C. 1951, which was enacted for identical anti-racketeering purposes. It is clear that under Section 1951 a victim of extortion is not criminally punishable and there is no sound justification for construing the Travel Act to permit a contrary result.

The government in its opposition to our Petition has not seen fit to respond to that claim, presumably because it is not able to make any persuasive response. Similarly, the Court of Appeals, perhaps for the same reason, did not discuss the merits of this claim. This silence can only serve to underscore the need for this Court to decide whether sound principles of statutory construction, and the dictates of due process, allow the prosecutor, at his sole discretion, to determine whether a businessman is a victim or a criminal depending upon which of these two sister statutes—intended to serve the same end—is employed by the prosecutor on a particular set of facts.

The government has also given no adequate response to our claim that the problems raised by a Section 1952 prosecution on facts where there are substantial contacts with more than one state required a more extensive considera-

tion of applicable state law than was provided by the courts below. This is especially true, where, as here, in one of those states, New York, it is specifically provided that extortion is a defense to bribery. (See New York Penal Law, Section 200.05, Kahn Petition, pp. 18-19.) Such an analysis would have required the court to conclude that if Pennsylvania law could not be determined, then New York law should have been applied. It was therefore error for the court below to conclude that lack of definitive Pennsylvania precedents permitted the court to look to authorities under a federal bribery statute, 18 U.S.C. 201.

Finally, there obviously is no merit to the government's assertion with regard to Pennsylvania law that the *absence* of "clear guidance" under Pennsylvania law provides "ample basis" for the lower courts' holding that petitioner Kahn could not defend against the Travel Act charge on the ground that the payment in question had been extorted (Memorandum in Opposition p. 6). This amounts to an argument that the *absence* of clear state law permits and indeed entitles a federal court to find that a state court would *restrict* the defense of a criminal case in the harshest way available. This approach not only "resurrects the shadow of the pernicious doctrine of common law crimes" (See Teleprompter's Petition, p. 20), but is flatly contrary to Pennsylvania's basic policy which favors that interpretation of state criminal law which "operates in favor of life and liberty." *Commonwealth* v. *Exler*, 243 Pa. 155, 162, 89 A. 968, 971 (1914); Kahn's Petition, p. 17.

The government presents no answer whatsoever to Kahn's point that the Travel Act does not apply in any event to conduct by a businessman which is isolated and is admittedly unrelated to racketeering, except to say that

Kahn's contention in this respect was "fully considered and rejected" by the courts below (Memorandum in Opposition p. 7, n. 5).

* * *

We believe that the government's failure to deal with the serious issues raised by Kahn's Petition springs from its inability to do so in any persuasive manner. Its response almost certainly is designed to mask this inability and is itself perhaps the best evidence of the need for this Court to set applicable standards of law and analysis for Travel Act and perjury prosecutions such as this.

Dated: New York, New York
April 26, 1973

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